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MINISTRY OF TREASURY, ECONOMICS
AND INTERGOVERNMENTAL AFFAIRS

LOCAL GOVERNMENT DIVISION

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DISMISSAL


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MINISTER OF ECONOMICS AND
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DEPUTY TREASURER OF ONTARIO AND
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Introduction

"You're fired!"

That doesn't seem to be a very difficult thing to say. And it is very clear that those two words mean that an employee no longer has a job with the municipality. But, those words do not necessarily mark the end of a relationship between the municipality and the employee. On the contrary, they may mark the beginning of a long and sometimes bitter confrontation, a confrontation that may go on and on through grievance procedures, council meetings, council hearings, arbitrations and perhaps even the courts. The confrontation often becomes highly emotional, on the part of the municipality as well as on the part of the employee.

Today, the legislation governing relations between employees and employers has several devices to make sure that individuals are not mistreated by corporations, municipal and otherwise; that the employee receives every protection; that he is treated fairly and without prejudice. This bulletin is to assist municipalities, both councils and staff, through the difficult process of dismissing an employee. It is to help make sure that you remain unemotional, avoid rash or impetuous action and comply with the law. It is to help your municipality guard against inadvertently violating the rights of its employees and being left open to charges of unfair practice and to help avoid the possibility that the municipality be held liable for damages.

The bulletin is designed to help protect municipal employees as much as it is to help protect the municipality, but it cannot do this alone. You should never dismiss without reference to a solicitor; you should always obtain legal advice before taking action.

Who May Dismiss Municipal Employees

As a general rule, the municipal council, which has the authority to appoint employees (and to pass by-laws providing for the appointment of employees) also has the authority to dismiss employees. If an employee is appointed by by-law, then the dismissal of that employee should also take place in the form of a by-law. (This would include all "statutory officers" such as clerk, deputy clerk, treasurer, deputy treasurer, chief administrative officer, auditor, collector and engineer.)

In cases where council passes a by-law authorizing a chief administrative officer or department head to appoint and terminate certain employees, then the chief administrative officer or department head will be responsible for dismissing those employees. Council may or may not be involved in these dismissals; it depends on the specific wording of the by-law.

The mayor, reeve, or any other individual member of council does not normally have the authority to dismiss employees on his or her own. The same is true of a committee of council. Only council has authority to dismiss employees. The exceptions are municipalities that have boards of control and situations where council has delegated authority to a chief administrative officer or a department head as indicated above.

Who May Be Dismissed

Every municipal employee is subject to dismissal provided, of course, that there is sufficient reason. Section 238(1) of The Municipal Act provides that all officers of the municipality hold their offices at the pleasure of council. This has been held to mean that they may be dismissed without cause, without notice, without recourse, and at any time, although the case in which this decision was handed down occurred a long time ago, and may not represent today's thinking. (This is discussed further under "Reasons For Dismissal".) Certain officers are entitled to a hearing before they may be dismissed. (See the section, "Dismissal Hearings".) Other employees of the municipality may be dismissed for improper conduct and other just cause after due enquiry.

Dismissal Hearings

Certain municipal officers may not be dismissed except following a hearing by council or by committee of the whole council. The officer who is being dismissed must request the hearing. The officers who are entitled to such a hearing are the chief administrative officer, clerk, treasurer and engineer. (See The Municipal Act, section 238(2).) It is important that council consult with a solicitor before taking dismissal action, and also arrange for the solicitor to be present to advise council at the hearing.

Dismissal hearings for these officers are held under the authority of The Statutory Powers Procedure Act, 1971. The Act simply attempts to ensure that rules of natural justice are applied where a body (i.e. council) exercises a statutory power of decision, (i.e. dismissal).

Where council intends to dismiss an officer in this category, it must notify the officer of its intention and advise him of his right to request a hearing. In some cases, it may be advisable to suspend the officer until the date of the hearing. If this is done, the suspension should be with pay, because suspension without pay is virtually a temporary dismissal and, as already pointed out, these officers may not be dismissed prior to a hearing.

The notice to the officer should give him a reasonable time to respond and to advise whether he wants a hearing. The notice should also indicate that, if the officer does not respond, he will waive his right to a hearing. If the character, conduct or competence of the officer is being called into question, he should be so informed in order that he may be prepared to respond to the charges.

If the officer requests a hearing, council must give notice of the hearing. This notice should include the time, place and purpose of the hearing, a reference to the statutory authority under which the hearing will be held (i.e. The Municipal Act, section 238(2)) and a statement that the hearing will proceed even if the officer does not attend and that the officer will be entitled to no further notice.

The officer has the right to choose whether the hearing will be by council or by committee of the whole council. It appears that the choice is really between an open hearing (council) or a closed hearing (committee of the whole council); however, if the officer chooses a hearing by council, council may be resolution decide to hold a "special meeting", which would be closed if it is in the best interest of the public. (See The Municipal Act, section 193.) At the hearing, the officer may be represented by counsel or an agent, may call witnesses, may cross-examine witnesses and may present his argument and submissions. (A recent amendment to The Municipal Act permits council to delegate its obligations to hold hearings to a committee of council. (The Municipal Act, section 242(b))

At a dismissal hearing, council may exercise the full power of a tribunal under The Statutory Powers Procedure Act, 1971. It may issue summonses requiring persons to give evidence on oath and to produce evidence and documents. It may hold a person in contempt for failure to do so. Before proceeding with a hearing, however, members of council should familiarize themselves with The Statutory Powers Procedure Act, 1971 and especially those parts dealing with the admissibility of evidence and the protection of witnesses.

Once all the evidence has been heard, council must make a decision. If the decision is made at a meeting other than the hearing meeting, council making the decision must be constituted the same as it was at the hearing. A member of council who was absent from the hearing (and did not hear the evidence and arguments) may not participate in the decision.

A full record of the proceedings of the hearing is to be maintained. Council must give notice of its decision, in writing, to the officer and, if requested by the officer, the notice must include the reasons for the decision. Finally, if the decision is to dismiss the officer and his appointment was originally made by by-law, then the dismissal should also be by by-law. (In other words, a by-law should be passed to repeal the appointment by-law.)

The foregoing, for the most part, is taken from The Statutory Powers Procedure Act, 1971. Reference should be made to the Act itself if you find that you have to conduct a dismissal hearing.

Reasons For Dismissal

The right to dismiss is the major source of an employer's authority over his employees. There are only two ways to dismiss employees. The first is for just cause, in which case the dismissal is effective immediately. The second is dismissal with reasonable notice, and is used where there is not cause. It is effective after a period of reasonable notice. Most collective-bargaining agreements state that members of the bargaining unit may only be dismissed for cause, or for just cause. If you have a union in your municipality, your contract with them probably has such a clause. In that case, you may not use the second way of dismissing your union employees. In view of this, and because dismissal on proper or reasonable notice is not a common practice, for either unionized or management employees, this bulletin will discuss only dismissal for just cause.

"Just cause" is a phrase that is used by everybody, yet few people understand exactly what it means. Quite simply, it means that the cause, or reason, must be just, or reasonable, fair and equitable. There is no magic formula that says that one action is just cause for dismissal while another is not. What is just cause in one instance may not be in another instance. No two situations are exactly alike and each case must be considered on its own merits. It is also critically important to remember that, where an employee is dismissed for just cause, the onus of proof rests with the employer.

Section 238(1) of The Municipal Act says, in part, "all officers appointed by a council shall hold office during the pleasure of the council..." In the past, this has been held to mean that officers may be dismissed without cause, without notice, without recourse and at any time. This type of dismissal is a product of a previous time, and does not reflect the current situation; the law has changed considerably and a great deal of legislation has been introduced to protect employees from the whims or fancies of employers. As a

general rule the courts may intervene if an insufficient reason is given for dismissal. In other words, dismissed employees may sue the municipality for damages for wrongful dismissal. Thus, municipalities should not rely solely on this section of the Act to dismiss officers; they should take the same measures and exercise the same precautions in dismissing an officer as they would for dismissing any other employee. If the municipality has to rely on section 238(1) to dismiss an officer, then the reason is probably insufficient.

Misconduct is one specific cause that is frequently used to justify dismissal. Misconduct includes a multitude of acts, but most of them are not of the variety that would justify dismissal. Misbehaviour, for example, is not the type of misconduct that normally calls for such a drastic step. In order for misconduct (or malfeasance) to be just cause, it must be relevant to the position the employee holds. Conviction for drunk driving might be just cause for dismissal of a truck driver; on the other hand, it would likely not be just cause for dismissal of the municipal treasurer. The key is that the misconduct must have a direct bearing on the job being performed.

There are, of course, many valid reasons for dismissing employees; no municipality is required to keep a person on staff where there is good and sufficient reason to dismiss him. Some typical reasons for dismissal are: dishonesty (including theft and misappropriation); falsification of employment forms; insubordination; fighting; absenteeism; drinking on the job; sabotage; incompetence; breaking rules; sleeping on the job; and safety violations. There have been cases when each of these reasons has justified dismissal. There have been other cases when many of these reasons have not justified dismissal.

An employee cannot be dismissed for something that has been condoned in the past. If an employee has always used a municipal vehicle to travel back and forth from work and he has never been told not to do so, then he cannot be fired for using municipal equipment to his personal advantage. The employee must know that he is doing wrong. (The situation would likely be quite different if the employee continued to use the vehicle after repeated warnings to stop.)

Be careful of the action you take in the case of a "momentary aberration" or once-in-a-lifetime incident. For example, an employee with 25 years service who has a perfect attendance record suddenly, for no apparent reason, takes a day off. This is completely out of character, and would hardly justify dismissal. If the employee were dismissed, an arbitration board or court would likely reverse your action and/or award damages, particularly if remorse is shown by the employee.

It is important to remember that if you dismiss an employee, the time will likely come when you will have to justify your action before a third party. Thus, the complaints against the employee must be substantial. They cannot be gossip or rumour. They cannot, for example, be merely the collective suspicions of some members of council who, for one reason or another believe the employee to be unsatisfactory.

Each case is a unique situation; no two sets of circumstances are ever exactly the same. You alone can decide whether or not a specific incident warrants taking dismissal action. There are no hard-and-fast rules, but in making your decision, you should ask yourself the following questions. Has this type of incident happened before? Is it likely to happen again? Is the offence really serious enough to warrant dismissal? Is there an acceptable alternative to dismissal? Is this a "culminating incident"? Finally, is the employee worthy of salvaging?

Procedure

There are some forms of employee behaviour that call for immediate action on the part of a municipality. An example might be the discovery that an employee has been accepting tax payments and putting them in his own pocket. Obviously, the impulse would be to fire him on the spot; however, that may not be the proper course of action. It is highly important, in a situation such as this, to proceed carefully and take action only after investigation and consideration of the facts, not the appearances. At all costs, you should avoid hasty and uninformed reaction. It may be advisable, and even necessary, to suspend the employee with pay until the facts are known, and it would

surely be a mistake to dismiss without knowing the facts and without hearing the other side of the story. It is in your best interests to obtain legal advice immediately. You should never dismiss without reference to a solicitor.

In other cases, most likely the majority, no single incident is likely to be serious enough to warrant dismissal. A series of incidents without evidence of attempt to improve or change by the employee, however, may ultimately result in dismissal. Examples might be incompetent performance or insubordination. In this type of case, the employee must know that his behaviour is not satisfactory; it is hardly fair to fire a person without his knowing he was doing wrong or without his being given a chance to improve.

It is this type of behaviour that calls for discipline, and the purpose of the discipline is to improve the employee's behaviour, not to punish him. If the employee is a member of the union, you must of course follow the discipline procedure laid down in your collective agreement with the union. If the employee is not a member of the union, there is no reason that you should treat him differently than you would a union member. Typically, a discipline procedure may call for a verbal warning for the first incident, a written warning for the second incident, a one-day suspension for the third incident, a two or three-day suspension for the fourth incident and, finally, dismissal if the behaviour does not improve.

The importance of keeping a written record of every reprimand or discipline action cannot be overemphasized. If an employee is given a verbal warning, a notice to that effect should be placed in his file, stating precisely what was discussed and the improvement that was required. If a reprimand is given in an open council meeting, the minutes of that meeting should reflect exactly what was said. If reprimand is given in an in-camera or committee-of-the-whole meeting, it should be followed up in writing to the employee, recording exactly what was said. Thus, should it ever become necessary to dismiss an employee, you will be able to demonstrate that he was made aware of his shortcomings and was given the opportunity to change or improve.

Ultimately, of course, there will be the employee who cannot or simply will not alter his behaviour in spite of all the discipline and/or reprimands he may have been given. There is then little alternative but to proceed with dismissal. Before doing so, you should satisfy yourself that you have done everything to help the employee improve. You should make sure that you have followed the procedure laid down in the collective agreement (if the employee belongs to the bargaining unit). Finally, you should refer to your solicitor to make sure you are within your legal rights in dismissing the employee.

Summary

Dismissal is the ultimate penalty. You should not overlook the fact that, in most cases, the employee is well worth salvaging. You probably already have a considerable investment in the employee (in the form of employment and training costs, for example,) and there are forms of discipline short of discharge that may bring about the desired improvement.

Remember that, when you do dismiss an employee, you are terminating his means of livelihood as well as affecting the possibility of his gaining other employment. It is a serious step, and one that should not be taken lightly. Judges and arbitrators alike will be quick to reverse dismissals and/or award damages against the municipality where the dismissal cannot be fully justified. Wrongful dismissal can be extremely expensive, not only in terms of legal costs but also in terms of damages, and this cost is, of course, passed directly on to the taxpayer.

Finally, it is strongly recommended that you obtain legal advice prior to dismissing any municipal employee.

Do you want more information on this subject? Ask any of the field officers of the Local Government Division. They are located at these addresses:

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